



June 26, 2002

Ms. Deena J. Wallace
Associate General Counsel
Texas A & M University System
301 Tarrow, 6th Floor
College Station, Texas 77840-7896

OR2002-3471

Dear Ms. Wallace:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164915.

The Texas A&M University System (the "university") received a request for information from the Texas Engineering Extension Service ("TEEX") testing website. Specifically, the requestor seeks the following student information relating to the National Emergency Response and Rescue Training Center ("NERRTC"): student names, student employment descriptions and titles, organizations, organization addresses, organization telephone numbers, the number of times tests were administered, which questions students answered incorrectly, and which tests students successfully completed. You state that you have no information responsive to the request for organization telephone numbers. The Public Information Act (the "Act") applies only to information in existence at the time the governmental body receives the request for information. *See* Open Records Decision Nos. 452 at 2-3 (1986) (document is not within the purview of the Act if, when a governmental body receives a request for it, it does not exist), 342 at 3 (1982) (Act applies only to information in existence, and does not require the governmental body to prepare new information). Furthermore, the Act does not require a governmental body to create information in response to a request. *See* Open Records Decision 452 (1986). Therefore, the Act does not apply to the organization telephone numbers sought in the fifth part of the request. You claim that the remainder of requested information is excepted from disclosure under sections 552.101, 552.114, and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note that you do not appear to have submitted information responsive to request item six, the number of times the tests were administered. To the extent that any information responsive to item six exists, we assume that it has been released. If you have not released any such information, you must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302.

You ask whether the NERRTC is subject to the Family Education Rights and Privacy Act ("FERPA"), section 1232(g) of title 20 of the United States Code. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent or, if the student is age 18 or is attending an institution of post-secondary education, the student. *See* 20 U.S.C. § 1232g(b)(1).

You inform us that the NERRTC is a division of TEEX that offers training in a variety of subjects, of which the Domestic Preparedness Campus is a part. You state that TEEX is "one of eight state agencies, nine universities and a health science center governed by the Board of Regents of The Texas A&M University System." Under the Texas Education Code, TEEX is "an agency of education" as well as "an institution of higher learning." Educ. Code § 61.003(6), (8).

You ask whether FERPA applies to TEEX as a whole, or only to its training program that receives federal funding. FERPA defines an "education agency or institution" as "any public or private agency or institution which is the recipient of funds under any applicable program." 20 U.S.C. § 1232g(a)(D)(3). The Code of Federal Regulations provides that FERPA applies to "an educational agency or institution to which funds have been made available under any program administered by the Secretary" if "the educational institution provides educational services or instruction, or both, to students." 34 C.F.R. § 99.1(a), (a)(1). Section 99.1 further provides that if "an educational agency or institution receives funds under one of more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university)." 34 C.F.R. § 99.1(d).

You state that one TEEX division, the Career Advancement and Applied Technology Training Division, now receives funds under various federal programs, including the Workforce Investment Act of 1998, section 504 of the Rehabilitation Act, section 794d of title 29 of the United States Code. Section 2871(f)(3) of that title provides that in carrying out the requirements of the Workforce Investment Act, a state must comply with FERPA. 29 U.S.C. § 2871(f)(3). Additionally, you have submitted to this office an Eligibility and Certification Approval Report from the United States Department of Education for the Career Advancement and Applied Technology Training Division. This report reflects the division's eligibility to participate in the federal Pell Grant program, the Federal Family

Education Loan Program, as well as Title IV programs under the Higher Education Act of 1965. We find that, because TEEEX is an educational agency under FERPA, and because TEEEX receives federal funds for one or more of its programs, the requirements of FERPA apply to TEEEX as a whole. 34 C.F.R. 99.1(d). Accordingly, the NERRTC, as a division of TEEEX, is subject to FERPA.

“Education records” means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution must withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded must withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a “student record,” insofar as the “student record” is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. In this instance, however, you have submitted the documents at issue to this office for consideration, which you have redacted. Therefore, we will consider whether these documents contain information that is excepted from disclosure under FERPA.

Information must be withheld from required public disclosure under FERPA only to the extent “reasonable and necessary to avoid personally identifying a particular student.” *See* Open Records Decision Nos. 332 (1982), 206 (1978). The information at issue directly relates to students. The university must therefore withhold the student-identifying information pursuant to FERPA. Thus, you must redact student names from the submitted information. To the extent that students would be personally identified by information relating to title, organization, or organization address, this information must also be withheld under FERPA.

FERPA generally permits the release of education records without consent to certain entities and certain individuals under certain circumstances. *See* 20 U.S.C. § 1232g(6)(b)(1)(A) - (J). However, we have no information to allow us to conclude that the requestor here, the Alabama Department of Health, is entitled to the requested educational records under FERPA in this case.

We now address your assertion that portions of the submitted information which you have highlighted in blue are excepted from disclosure under section 552.122. Section 552.122 excepts from disclosure test items developed by an educational institution or by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term “test item” in section 552.122 includes any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee’s overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a

case-by-case basis. Open Records Decision No. 626 at 6 (1994). You contend that the information that discloses correctly-answered questions is excepted under section 552.122. After reviewing the submitted records, we agree that the information constitutes "test items." Accordingly, you may withhold the information you have highlighted in blue under section 552.122(a).

In summary, in accordance with FERPA, you must withhold the information you have highlighted in yellow to the extent that it personally identifies students. You may also withhold the blue-highlighted information under section 552.122(a).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 164915

Enc: Submitted documents

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